

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

75-7463
ORIGINAL *To be argued by
Bernard Meyerson*

United States Court of Appeals
For the Second Circuit.

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PJS*

JAMES B. LANSING SOUND, Inc.,
Plaintiff-Appellee,

against

ULTRALINEAR SOUND CORP. and EDDIE ANTAR,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF DEFENDANTS-APPELLANTS.

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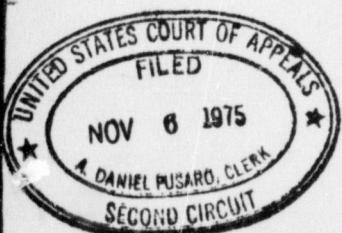


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Statement of Issues Presented on Review.

1. Can a defendant charged with orally violating an injunction under the Fair Trade Act be held for contempt of court when the sworn affidavits of the accusers are shown to be a flagrant example of false swearing and their testimony in turn failed to make any specific charges of contempt?

2. After the court realizes the weakness of the charges can he nevertheless hold defendant in contempt because he failed to bring it sales slips as to all his sales although the charges against defendant do not claim that sales were made below the Fair Trade price?

Statement of Case.

The proceedings below were to punish defendants for contempt of court for alleged quotations of salesmen of prices below Fair Trade. The moving affidavits made by the plaintiff's shoppers were definite as to persons and price. When faced with an Affidavit that the "boss" who was mentioned in the affidavit was out state at the time, the first shopper was quick to change his testimony but the rest of his testimony disclosed that besides falsely swearing, he made both mistakes and assumptions. The second shopper also had to abandon his sworn affidavit and give testimony that was vague and only as to approximation of price. Though the judge found for plaintiff, it realized the weakness of his decision and therefore added that it was moved that way because defendant had not produced any records as to its sales. The court overlooked the fact that the charges against defendants did not involve sales and consequently their attorney would not bring records that were not involved in the proceeding.

Testimony of Moving Party.

Frank Graziadei testified that he is a shopper for JBL Harmon-Kardon and a student at Fordham Law School (34a). That his duties are to go into each store, ask the price on a stereo system, look at the displays and the attitude of the salesmen. His instructions were to introduce himself, try to obtain a business card from the salesman he talked to, ask the price of the JBL

speakers, never give the name of another store "or try to bait a salesman in any way or, in other words, try to get the price lower." He was to ask the price of a complete system and the price of JBL speakers alone (35a).

He recalled that on May 31, 1975, he visited the premises of the defendant Ultralinear Sound Corporation at about 7:30 P.M. That he went with a friend. The two of them walked into the store and the friend went downstairs to the in-car sets and he went upstairs. That he met a salesman, but he did "not recollect his name" (35a, 36a). He shook hands with the salesman, introduced himself and told him he was looking for the Pioneer 626 the dual 1266 or 1229 turnable. That he was *not* sure about the type of speakers but he was interested in the JBL 100's and he would like to listen to them. That the salesman tried to sell him a brand called Acuphase and he discussed both brands and received a price of \$475 for the JBL speakers from the salesman (36a). However, in his sworn affidavit he claimed to have received the price of \$470. But he now claimed \$475 was correct. He identified the salesman in court as one Howard Schreiber (38a). He told the salesman that he definitely wanted the Pioneer and he wanted to listen to them and "which ones would be recommend" (38a). But the salesman tried to push the Acuphase on him. That it was a cheaper speaker and JBL had a flat mid-range. That after he got the price of \$475 he stopped asking him the price of it. That they continued the conversation about Acuphase versus JBL and the salesman showed him a JBL speaker that had blownout because JBL had not changed their constructions in years (38a, 39a). That his friend then came upstairs and the salesman quoted him \$225 for a Kimwood. His friend said he could get it for \$215 and the salesman turned to another guy who he thought was Eddie, and he said

"he can get it for \$215" (39a). Eddie asked where can he get it and "his friend told him" and Eddie said all right he can have it for \$215 if he puts a deposit on it and buys it tonight or tomorrow (40a). This second gentleman appeared to be in authority in the place but he was not in the courthouse. That he was in the store 35 minutes and then he left, walked across the street to his car and right then started filling out the form (41a).

On cross examination the witness testified that he shops for a price but never attempts to make a purchase with money. He attempts to get written quotations. That he asked for one but did not receive same. He did not get a sales receipt or leave a deposit (43a). He agreed that it was possible that a salesman could make a mistake. That when he signed this affidavit, he *knew* that it would be used in a contempt proceeding. In answering to the question as to what precautions he observed to rule out the possibilities of mistake, he answered:

"A. Well, at the time I was instructed to go to Mr. Goldman's office to read over the affidavit which was prepared for me" (44a).

That when he left the store, he wrote down immediately in the shopping form so he would not "be mistaken as to price or the identity of the salesman" (45a). He thought that he stated in his affidavit that he went into the store with a friend but he did not so state (45a). He did not state that he went upstairs and his friend went downstairs. He did not state in his affidavit that there might be a discrepancy in price because he did not have his shopping form with him at the time (he did not state who gave that information to the preparer of the affidavit) (46a). He believed that he stated in

his affidavit that he discussed other products (46a). He admitted that his sworn affidavit contained the statement:

"Toward the end of our conversation the defendant Eddie Antar came up to us and I had a short conversation with him concerning another product" (47a).

He now claimed this was a mistake because he thought the person was Crazie Eddie. Therefore he admitted the possibility of a mistake. Again he admitted that he read over the affidavit and he signed it. He was mistaken about the person but not about the price. He did not put down in his affidavit that the man had a beard (48a). That he saw an Acuphase poster but he did not remember what it said (52a). He did not read the other posters (53a). He wrote the serial number of two speakers on a dollar bill but he spent the dollar. He did not see fit to turn that dollar bill over to Mr. Goldman or his superior. That he never attempted to confirm any price with the cashier (54a).

His astonishing testimony as to what the salesman said was "that because the price of JBL speakers go to \$475 * * * because they were cheaper and a better speaker, buy the Acuphase" (55a). However he put in his affidavit that the salesman quoted a price of \$470 per pair (56a). That he told Mr. Goldman over the telephone what had happened and he said "well fine, come in tomorrow, you could read the affidavit and you can sign it and if there is anything wrong with it you can change it" (57a). He believed that he shopped in that store the summer before (57a).

On re-direct the witness claimed he sought a written report and the salesman told him that none was

necessary and all he had to do was come back. The court question pointed out that on the second page of Exhibit 1 that next to price quote was the figure of \$475 which the witness had crossed out (58a).

His further testimony was that the salesman did not tell him that the speakers he was quoting on were damaged or that they were being used as demonstrator models (103a). He did not put same on his report as he "was under the assumption that they were brand new speakers." He admitted that he *definitely* could have made an improper assumption. He did not recall seeing the sign (Defendants' Exhibit A). He then denied that he was told that the price quoted had to be confirmed by the cashier (104a).

Lawrence Fay testified that he was a shopper for Harmon-Kardon JBL Stereo (59a). That he was to find out what the stores were selling the JBL speakers for and whether or not they were abiding by the Fair Trade Law. That he went to the Ultralinear Sound Corporation's store on or about April 26, 1975. He believed that he went there in the later afternoon (60a). That the day was Saturday and the place was crowded. He had a long wait to talk to a salesman so he approached a salesman and inquired about JBL speakers and the salesman told him to come back because the place was crowded. He insisted on a "rough" or "approximate" cost and the reply was that the cost was "approximately" \$500 for the 100's and \$400 for the 36's." He *believed* that at that time the 100 was going for \$600 a pair. The salesman was Barry (61a). He was only in the store for 15 minutes because it was very busy.

On cross examination, he was shown his affidavit and asked if he stated that the place was very crowded and he answered "I don't believe so" (64a, 65a). He also

did not state in his affidavit that the salesman told him to come back another time. He did not tell the salesman that he wanted to purchase something immediately. Again he admitted that the salesman did *not* give him a specific price. He just said approximate price (65a). He said the price given for JBL speakers was \$400, but then he suddenly changed his testimony to "I believe it was \$300" (6^c1, 67a). He was reminded of his direct testimony of \$400 and then he claimed he could get confused very easily (67a). He admitted discussing his testimony with Mr. Goldman prior to his coming to court on two occasions. That the day before they discussed his testimony in Mr. Goldman's office (68a). He believed he signed the shopping form when he filled out same (69a). But he then admitted that he had *not* signed same. He then testified that he was misled by defense counsel. He finally admitted that there is a possibility that at times he made a mistake (70a). He could not approximate the size of defendant's place but he can approximate price (71a). He was unable to quote how many speakers were on display. He did not recall reading any posters, advertisements, flags or signs (72a, 73a). He did not even recall that there were things hanging up. That his employer furnished him with a price sheet. He did not entertain the thought that he "could make a mistake in terms of what I was doing at the present time" (73a).

When recalled he stated that the salesman did not tell him the speakers were damaged or being used as demonstration models or that the cashier had to confirm the price. He did not see Defendants' Exhibit A (105a).

On cross examination he admitted that he had testified that he had not read the signs. He did not con-

firm a price with the cashier because he was not making a purchase (106a).

Burt Brooks testified that he is Eastern Regional Manager for the Harmon International Audio Teams. That on or about April 26, 1975, the price for each single L36 speaker was \$198 (77a). The price for the L100 speaker was \$291. On May 31, 1975, the price for the L100 speaker was \$318. That there was a price change in May, 1974, for the L36. This speaker did not become available until the fall of 1974 (78a). That the price for the L36 changed from time to time. That in September, 1974, its price was \$297 and this price was increased on May 1, 1975 (79a).

On cross examination this witness testified that the price on the L100 changed from April 26, 1975, and May 31, 1975, which was within a thirty-day period (79a, 80a). That he did *not* afford Ultralinear Sound Corporation notice of this price change and it was possible they did not have notice of same (80a).

The Defense.

Eddy Antar testified that he is a principal of Ultralinear Sound Corporation. That on January 12, 1975, he received a letter from Mr. Neal Goldman asking him to adhere to the Fair Trade prices of the JBL products. He replied to this letter (83a, 84a). (The reply was read into evidence on pages 84a, 85a.)

That the only products they discounted were demonstration models. These are speakers that are placed out on the floor and used a week, two months or a month before they are sold. They get scratched and damaged and they sell them off the floor as demonstration models. That after he sent the letter he had a meeting with his sales-

men and told them they were not sell any JBL products below the Fair Trade schedule. The demonstration models are kept in one corner of the sound room (86a). That they have a sign posted in the sound room (Defendants' Exhibit A). The sign reads "Crazie Eddie's discount on all demonstration models greatly reduced. Ask for our lower prices. Some slight irregularities." That this sign is posted in the sound room on the wall. It was posted on April 26, 1975, and prior thereto. It was also posted on May 31st, 1975. That they get full list price on JBL models when they are available. He does not discount new JBL Products (88a, 89a).

He described his method of conducting business and making sales. That when a salesman waits on a customer, he tries to suit his system or whatever the customer's taste, and then he brings it down to the cashier to have the prices verified and, if they are okay, the sales goes through. He instructs the cashier to verify all prices and there are very seldom mistakes (89a). That he has never sold a new JBL speaker for below the Fair Trade since the issuance of the injunction order last October (89a, 90a).

On cross examination the witness testified that he could not remember how many new JBL 100's he sold between last October and the day of the hearing because *JBL dried up their sources of supply*. He did not bring his sales records to court (90a). That they sold brand new models at Fair Trade prices and demo models at a discount, depending on the condition of the speaker. That they received a price schedule. They sold only six or eight pairs of speakers during that period. That they write demonstration model on the receipt (91a).

That when the merchandise is put in the sound room, it is touched and handled by a lot of people. If kept

there it would actually start to fall apart. There is no specified time. Someone may spill a cup of coffee on it, customers scratch them and people put cigarettes down on them. That either he or the cashier determines whether a particular item can be sold as a demonstration model (92a). The price depends upon the condition of the speaker. That he has only sold two or three new models of the L362 since last October (93a).

Eddie Antar testified that his only capacity with Ultralinear Sound Corporation was to coordinate advertising and radio advertising (95a). That he has no say in the management of the corporation. That he is the owner of the federally registered trademark known as Crazie Eddie. He entered into a trademark license agreement with Ultralinear Sound Corporation. It uses this name and pays him a royalty. He has no other connection with the Corporation (96a).

On cross examination this witness stated that he signed the injunction in October, 1974, but he does not work for the Company as of January, 1975 (97a). In October, 1974, he held the position of salesman (97a, 98a).

Howard Schreiber testified that he is a salesman at Ultralinear Sound Corporation. That each item he sells is marked and the final sales is the cashier. He did not recall waiting on Mr. Graziadei and he never quoted JBL100 nor any JBL product below Fair Trade (99a, 100a). That damaged goods are sold below Fair Trade prices but the final sale has to be taken up with the cashiers. The office manager or the cashier fixes the price (100a).

Barry Borris testified that he is a salesman at Ultralinear Sound Corporation. That he sells JBL products but he does not discount same. That damaged or demon-

strator models are sold below Fair Trade price. These prices are determined by the sales manager or the cashier (101a).

He did not recall waiting on Mr. Fay. That when a customer approaches him he asks the customer what he is interested in and if he wants to buy immediately. If the customer does not want to buy immediately and it is very busy, he tells the customer to come back when there is time to discuss it further. That he never sold a new pair of JBL speakers at any price below Fair Trade (102a).

POINT I.

The atrocious testimony of the moving party fell far short of the modicum necessary to convict the defendant of contempt.

A reading of the record leads one to the definite impression that because the Fair Trade Law was about to expire that some flying visits were made to defendant's place in a desperate attempt to get it fined for an alleged violation. The defendant was probably picked because it handled very little of plaintiff's product (90a) and had not even been informed of plaintiff's latest prices (80a).

The kind of testimony introduced by the moving party clearly demonstrated that the shoppers had failed in their mission but were desperate to succeed. Thus, Frank Graziadei he claimed he very carefully read his affidavit (45a, 57a). Nevertheless he had no punctuation to falsely swear in his affidavit that he had a conversation with "Eddie Antar" (of course it was a vital blow to any defense if the boss approved the transaction) (47a).

When he was faced with Antar's affidavit (26a, 27a) he realized the magnitude of his false swearing, he then changed his testimony to "who I thought was Eddie" (39a). When he knew that he was on dangerous ground because the alleged Eddie was not in the premises at the time (27a), he just called his false swearing a mistake (45a). This mistake seemed to continue because he fixed a good low price in the affidavit, \$470 (24a), but feeling it was too low he backed away from the price and raised it to \$475 when he testified (36a, 38a). The final admission of this witness was that he never received a direct quote from the salesman. Instead the salesman said "because they go to \$475," "because they were cheaper and a better speaker buy the Acuphase" (55a). Thus we do not even have a direct quotation on price. Rather all he got was a sales talk that the Acuphase was a cheaper and better article than his firm's brand. Thus, we fail to find contempt in such a speech as related by a person who had no regard for his oath in an affidavit and who even admitted that he had made *assumptions* that could have been improper (104a).

The other supporting witness, Lawrence Fay, had the same weakness. He also made a definite affidavit that he visited the store, told the salesman that he was interested in JBL speakers and got a definite quotation (21-22a). His testimony also disclosed that for some undisclosed reason that this affidavit had been tailored to look as if the salesman of defendant had definitely committed a contempt. However, he did not dare and follow up this affidavit with testimony. It seems that, unfortunately for his mission, he had arrived at a time when the place was very crowded and he could not talk to any salesman. Because the salesman was very busy he did not attempt to even get a quotation. He just said to this busy man I want the rough or approximate costs and the reply he received was approximate (61a).

If a busy man was asked for a rough or approximate cost he would have to give all figures of new and demonstrator models. Therefore, a time saving way would be to approximate the costs of both. This witness admitted he never received a specific price (65a) and he never explained why he stated otherwise in the affidavit. He was invited to come back (65a) and if he had returned when the place would not have been so busy he could have received a definite quotation (the items were all plainly marked so a verbal quotation was not necessary) (100a), and he could have confirmed same with the cashier who was the only one with authority to oversee the prices (89a, 100a, 101a). Either this witness was too lazy or he had determined that his errand was futile as the defendant was not selling below Fair Trade prices, so he deliberately never took the trouble to return to the store and instead he just swore to an affidavit which he knew was not true and did not contain all the facts.

Actually the court below must have felt that these witnesses were too discredited to be believed so it based its real findings on the following:

"The defendants have brought no sales records to show that they ever sold JBL speakers at Fair Trade prices" (107a, 108a).

We respectfully contend that faced with the moving affidavits (21a-25a) no defendant would bring records to court as they would be no defense to the charges alleged therein. Therefore the court's reasons for its unjust conclusion is authority to reverse the order below.

CONCLUSION.

**This court should reverse the order of the District Court
and dismiss the proceeding with costs.**

Respectfully submitted,

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